IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1971

No. _____

HARRY COLEMAN, doing
business as CLUB HI DOLLY,

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL OF THE
STATE OF CALIFORNIA and THE
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD OF THE STATE
OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

McPHERSON BERRIEN E. MOORE,
KENNETH SCHOLTZ
1515 Redondo Beach Boulevard
Gardena, California 90247
(213) 327-1515 - 770-1515

Attorneys for Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Petitioner, HARRY J. COLEMAN, respectfully prays that a writ of certiorari be issued to review the final judgment of the Court of Appeals of the State of California entered in

the above matter on May 10, 1972.

OPINIONS BELOW

The written decision of the Department of Alcoholic Beverage Control revoking Petitioner's license is set forth in Appendix A. The opinion of the Alcoholic Beverage Control Appeals Board affirming the suspension is set forth in Appendix B. The order of the Court of Appeals denying a petition for writ of review was made without opinion (Appendix C). The order of the Supreme Court of the State of California denying a hearing was also made without opinion (Appendix D).

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Is the Alcoholic Beverage Control Act of the State of California unconstitutional insofar as it permits the Department of Alcoholic Beverage Control to revoke a license upon a determination that live entertainment is obscene or is contrary to public welfare or morals after an

administrative proceeding without requiring the Department to seek a judicial determination on the subject.

2. Is the power of the Department of Alcoholic Beverage Control to suspend or revoke a license for conduct contrary to public welfare or morals unconstitutionally broad when applied to speech and expression protected by the First Amendment.

3. Was the Department's finding that the events described in the decision were contrary to public welfare or morals supported by evidence sufficient to satisfy the requirements of the First and Fifth Amendments.

STATUTORY PROVISIONS INVOLVED

Article XX, Section 22 of the California Constitution which provides in relevant part:

> "The Department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving

moral turpitude."

California Business and Professions Code Section 24200.

The following are the grounds which constitute a basis for the suspension or the revocation of licenses:

> (a) When the continuance of a license would be contrary to public welfare or morals; the proceedings under this section upon this ground are not a limitation upon the Department's authority to proceed under Article XX, Section 22 of the Constitution.

STATEMENT OF THE CASE

Petitioner, HARRY COLEMAN, has been and now is the holder of a bona fide on-sale general license issued by Respondent, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL permitting him to engage in the activities permitted by said license at 12700 South Western Avenue, Los Angeles, California. Said premises are known as and do business as the "Club Hi Dolly."

On April 5, 1971 the Department of Alcoholic Beverage Control (ABC) filed an accusation against Petitioner which alleged that he had permitted or suffered his licensed

premises to be used in a manner contrary to public welfare or morals. Said accusation further alleges that female dancers and entertainers had engaged in obscene live conduct in violation of Section 311.6 of the California Penal Code. The accusations further alleged that the acts specified therein were cause for suspension or revocation of Petitioner's license pursu ant to Article XX, Section 22, of the Constitution of the State of California, and Section 24200(a) of the Business and Professions Code, in that said acts were contraty to public welfare and morals.

On July 28, 1971, a hearing on said accusations was held before Leon B. Traub, a hearing officer of the California Office of Administrative Procedure duly appointed to hear the case.

On or about September 30, 1971 ABC served an amended accusation on Petitioner, the amendment being a deletion therefrom that the acts violated Section 311.6 of the Penal Code.

On October 28, 1971, the Department adopted the proposed decision of the Hearing Officer. A true and correct copy of said decision is attached hereto as Appendix A and made a part hereof by reference.

Petitioner duly filed his notice of appeal from the decision of the Department to Respondent Alcoholic Beverage Control

Appeals Board. Written briefs were filed, and oral argument was heard by the Appeals Board. On April 12, 1972 the Appeals Board issued its written decision affirming the order and decision of ABC. A true and correct copy of the decision of the Appeals Board is contained in Appendix B and incorporated herein by reference.

On May 8, 1972 Petitioner duly filed a petition for writ of review with the Court of Appeal of the State of California for the Second Appellate District pursuant to Section 23090, et seq. of the California Business and Professions Code. Said petition was denied on May 10, 1972.

On May 17, 1972 Petitioner duly filed a petition for hearing in the Supreme Court of the State of California. Said petition for hearing was denied on June 7, 1972. Both of said denials were made without opinion and are set forth in Appendices C and D.

All of the findings of fact contained in the decision are supported by the evidence, with the singular exception of the finding that the various described acts were contrary to public welfare or morals. It is Petitioner's contention that there was no evidence offered to support that latter determination.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I

THE ALCOHOLIC BEVERAGE CONTROL ACT IS UNCONSTITUTIONAL INSOFAR AS IT PERMITS THE DEPARTMENT TO MAKE A DETERMINATION THAT LIVE ENTERTAINMENT IS OBSCENE OR CONTRARY TO PUBLIC WELFARE OR MORALS IN AN ADMINISTRATIVE PROCEEDING WITHOUT REQUIRING THE DEPARTMENT TO SEEK A JUDICIAL DETERMINATION ON THE SUBJECT.

Under the Alcoholic Beverage Control Act and the Administrative Procedure Act of the State of California, an accusation that a licensee has permitted conduct which is contrary to public welfare or morals is heard at a hearing presided over by a hearing officer who submits a proposed decision to the Department. Bus. & Prof. Code, Section 24210, Gov. Code Sections 11500, et seq. After the decision of the Department is adopted, the licensee may take an appeal to the Alcoholic Beverage Control Appeals Board, which is also an administrative agency, during which time the Department's decision is automatically stayed. Bus. & Prof. Code, Sections 23080-23089. Judicial review of an adverse decision

of the Appeals Board may be obtained only by filing a petition for writ of review to the Court of Appeals, during which time the decision of the Department is stayed only if a stay order is made by the Department or the court. Bus. & Prof. Code, Sections 23090-23090.7. The duty of seeking judicial review is upon the party effected adversely by the decision of the Appeals Board. Bus. & Prof. Code, Section 23090.

In a recent case this court held unconstitutional a similar administrative scheme whereby the use of the mails for commerce in obscene materials could be prohibited. Blount v. Rizzi, 400 U.S. 410 (1971), involved the constitutionality of 39 U.S.C. Section 4006 which permitted the Postmaster General to return as unlawful mail addressed to a person who is obtaining or attempting to obtain money through the mail for obscene matter, or is depositing in the mail information as to how, where, or from whom obscene matter may be obtained. (In a 1970 amendment, the section in question was renumbered as Section 3006.) A proceeding for such an order foreclosing the use of the mails must be commenced by written complaint and notice of hearing, which is held before a hearing officer who makes a written opinion containing findings of fact and statements of reasons. The pertiment regulations also provide for an administrative appeal within the Post Office Department and no order under Section 4006 may be issued until the administrative proceedings are completed. 400 U.S. pgs. 412-413. Under

the provisions of the Federal Administrative Procedure Act, a party adversely effected by a decision of the Postmaster General may seek judicial review, during which time the decision of the Postmaster may be stayed either by him or by the court. 5 U.S.C. Sections 701-706. Thus, the administrative circumstances under which the Postmaster General enforced the act in question are virtually identical to the procedural circumstances under which the Department operates.

In Blount the unconstitutionality of the postal act was based in part upon the grounds that it did not place the burden of initiating judicial review and of proving that the material is unportected expression on the Postal Department. It was also based upon the ground that prompt judicial review was not required. These same safeguards are lacking in the instant case. As in Blount, the fact that the decision suspending Petitioner's license did not become effective until administrative procedures had been exhausted does not save the procedural scheme, since it was Petitioner who was required to seek and obtain a judicial determination of error.

Blount applies directly to the instant proceedings. It applies all the more since the Department of Alcoholic Beverage Control is apparently authorized to impose disciplinary action on account of entertainment which is deemed to be contrary to public welfare or morals but has not been alleged or proved to satisfy constitutional definitions of obscenity.

The presentation of such entertainment is clearly a form of speech protected by the First Amendment, and the imposition of discipline on account of such entertainment cannot be constitutionally upheld unless grounded upon the most rigorous procedural safeguards. No such safeguards exist or were followed in the instant proceedings. Indeed, the Department by its determination that the conduct involved was per se contrary to public welfare or morals has in effect deprived Petitioner of a fact hearing on that critical issue leaving him as his only remedy the opportunity to "persuade a court" that the Department is in error.

II

THOSE PROVISIONS OF ARTICLE XX, SECTION 22 OF THE CALIFORNIA CONSTITUTION AND SECTION 24200(a) OF THE BUSINESS AND PROFESSIONS CODE WHICH PERMIT THE DEPARTMENT TO REVOKE OR SUSPEND THE LICENSE FOR CONDUCT "CONTRARY TO PUBLIC WELFARE OR MORALS" ARE UNCONSTITUTIONALLY BROAD WHEN APPLIED TO SPEECH AND EXPRESSIONS PROTECTED BY THE FIRST AMENDMENT.

The doctrine that a statute or regulation may be void because it is overly broad

has been succinctly stated by this court in Zwickler v. Koota, 389 U.S. 241 (1967), in which the doctrine of void for overbreadth was described as meaning that ". . . a government purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the areas of protected freedoms." The reason behind this rule is that the existence of such an overly broad statute is in and of itself an inhibition upon the exercise of First Amendment rights, even though attempted enforcement of the law against activities within the protected area could be successfully defended on the constitutional grounds. Dombrowski v. Pfister, 380 U.S. 479 (1965). In Dombrowski, the court said:

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, eg. Smith v. California, 361 U S. 147. When the statutes also have an overbroad sweep, as is here alleged, the hazard of Loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption

> that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See Baggett v. Bullitt, supra, 377 U.S. at 379. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . .'" Dombrowski v. Pfister, supra, 380 U.S. at page 486.

In the instant case, the Department has suspended petitioner's license because he permitted the presence of entertainment involving sex which was deemed by the Department of Alcoholic Beverage Control to be contrary to public welfare or morals. The entertainment was not alleged or found to be obscene and therefore must be speech protected by the First Amendment. Indeed, the Department originally alleged that the entertainment was obscene and in violation of Section 311.6 of the California Penal Code, but such allegation was deleted from the accusation after the hearing. If the Department's authority permits it to take disciplinary action in such circumstances, the authority is overly broad and void by virtue of the above cited cases. On the other hand, if the Department's authority to regulate speech is limited by implication to what is obscene under the First Amendment, the decision in the instant case is invalid because the performances were neither

alleged to be nor found to be obscene.

In general, forms of communication and entertainment which deal with or depict sex are protected by the First Amendment and may not be prohibited or restricted unless they are judicially determined to be obscene. Roth v. United States, 354 U.S. 476 (1957); Stanley v. Georgia, 394 U.S. 557 (1969); United States v. Reidel, 402 U.S. 351 (1971). As the California Supreme Court has said in respect of the performance of a dance:

> ". . . the performance of such a dance, like other forms of expression or communication prima facie enjoys protection of the First Amendment of the Constitution of the United States; it loses such protection upon a showing of obscenity." In re Giannini, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 658 (1968).

In the instant case, the accusation did not allege that any of the conduct was lewd or obscene. No violation of the Penal Code was alleged or found to have occurred. The Department's decision that the performances were contrary to public welfare or morals must be expressly based upon the proposition that the Department has the authority to regulate such entertainment whether or not it is obscene.

Except as limited by the Twenty-First Amendment the state regulation of alcoholic beverages must comply with the requirements of the United States Constitution. See Wisconsin v. Constantineau, 400 U.S. 433 (1971).

In a case directly on point, a three-judge District Court of the Central District of California held that Rules 143.3 and 143.4 of the Department of Alcoholic Beverage Control were unconstitutional insofar as they regulated the content of entertainment. The court held that the Department's rules must conform to the constitutional standards for the regulation of obscenity and that the state could not control such entertainment on a standard of public welfare and morals. The court also held that the Department did not have any special powers to regulate entertainment because alcoholic beverage licenses were involved. LaRue v. State of California, 326 F.Supp. 348 (1971), Prob. Jur. noted, California v. LaRue, 92 S.Ct. 559 (1971).

The issues in LaRue are virtually identical with the issues in the instant case, inasmuch as both involve the question of whether the Department's power under Article XX, Section 22 of the California Constitution permit it to impose disciplinary action on account of entertainment which is not obscene.

It is respectfully submitted that a writ of certiorari should be issued in the

instant case and the case combined with LaRue, which is now scheduled for hearing in the fall, 1972 term.

III

THE DECISION OF THE DEPARTMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN LIGHT OF THE WHOLE RECORD NOR BY FINDINGS IN THAT NEITHER THE FINDINGS NOR THE EVIDENCE CONTAIN FACTS TENDING TO SHOW THAT THE ACTS COMPLAINED OF WERE CONTRARY TO PUBLIC WELFARE OR MORALS.

In the previous argument, we have established that the constitutional authority of the Department is overly broad when applied to activities which fall within the protection of the First Amendment. We will show in the ensuing argument that the record in the instant case does not support a determination that any of the entertainment presented was contrary to public welfare or morals.

In cases under the public welfare or morals clause, assuming such power to be properly invoked in the instant case, the Department of Alcoholic Beverage Control must have before it evidence to establish

good cause for its decision. The requirement that there be proper evidence and findings to support a determination that there is good cause for revocation or suspension of a license has been recognized many times by the California Supreme Court. The Department's power is not absolute "but must be exercised in accordance with the law and the provisions that it may revoke the license 'for good cause' necessarily implies that its decision should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare and morals." Boreta Enterprises, Inc. v. Alcoholic Beverage Control, 2 Cal. 3d 85, 84 Cal. Rptr. 113, 120 (1970).

In the Boreta case, the court observed in a case involving topless waitresses:

> "This conduct was not illegal nor was it in violation of any duly issued rule or regulation of the Department. There was absolutely no evidence presented by the Department at either of the hearings which tended to support its conclusion that topless waitresses are contrary to public welfare and morals because they necessarily lead to improper conduct. No intemperance, exploitation, or lewd or criminal contact between customers and the waitresses were shown to have occurred on the premises. The challenged conduct

> in this case did not occur in the presence of juveniles or in the public streets. In sum, there was neither illegal nor improper conduct on the part of the licensee's waitresses. To establish 'good cause' for the revocation of a licensee's license, something more must be shown than that the licensee employed topless waitresses." 84 Cal. Rptr. at pgs. 127-128.

In the instant case, similarly, no rule or regulation of the Department was alleged or proved to have been violated. No section of the Penal Code was alleged or proved to have been violated. No improper conduct was shown to have occurred between the performers and any other person on the premises. (The shouting of various earthy observations and joking invitations to engage in sexual conduct by members of the audience is not illegal and can hardly be said to exceed standards of conduct for patrons in a bar.) No one on the premises was shown to be intemperate as the result of the acts of the dancers, no one was shown to have been exploited, no lewd or criminal conduct was shown to have occurred. No juveniles were shown to be present. No violation of law was established. In short, there was nothing in the record upon which the Department's determination that the conduct was contrary to public welfare or morals could be supported.

As in the case of prohibition of obscenity, in which community standards are deemed to be an objective fact which must be established by proof, the standards encompassed by "public welfare and morals" should also be deemed objective standards susceptible of proof. The fact that the Department may, if it be a fact, take disciplinary action on a lesser standard of proof than obscenity does not negate the protected status of the entertainment under the First Amendment. The First Amendment demands that the Department be made to prove by competent evidence its allegations that the public welfare and morals have been violated.

Not only has the Department failed utterly to introduce any evidence to meet its burden of proof, but petitioner has introduced substantial evidence to the contrary. Expert witnesses who testified on behalf of petitioner testified that nude dancing on a stage does not offend public welfare or morals nor does it exceed contemporary community standards. There was also testimony that there was no connection between such dancing and antisocial behavior. Petitioner also testified in his own behalf that patrons are fully advised that nude entertainment is going to be presented when they enter his premises, and that he knows of no incidents of a dancer being molested or of a patron getting on stage during such a performance. He also testified that the presentation of nude dancing does not appear to increase the sale of alcoholic beverage at his premises. Thus, the only substantial evidence in the record shows that the Department was

without foundation in determining that the conduct on Petitioner's premises was contrary to public welfare or morals.

IV

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

McPHERSON BERRIEN E. MOORE
KENNETH SCHOLTZ

Attorneys for Petitioner

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APPENDIX A

STATE OF CALIFORNIA

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

CERTIFICATE OF DECISION

File 19842

Re 12593

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by a Hearing Officer of the Office of Administrative Procedure, adopted said proposed decision as its decision in the case therein described on October 28, 1971.

A representative of the Department will call on you on or after December 16, 1971, to pick up the license certificate.

Sacramento, California
Dated: October 28, 1971

Dorothy Pierson
Hearing and Legal Unit

STATE OF CALIFORNIA

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL

Folios: 250

In the Matter of the Accusation
Against:

HARRY J. COLEMAN
Club Hi Dolly
12700 S. Western Avenue
Los Angeles

On-Sale Beer License

Received
October 19, 1971

Respondent- Licensee

File 19842 Licensee: 40
Reg. 12593

Time of Hearing:
July 28, 1971, 9:00 A. M.

Place of Hearing:
314 West First Street
Los Angeles, California

Reporter:
William Guthrie OLA 26135

Appearances:
For Dept: Doris Jaffe, Counsel
For Resp: Berrien E. Moore
by: Kenneth Scholtz
Attorney at Law
1515 Redondo Beach Blv
Gardena, California 90

under the Alcoholic Beverage Control Act.

I hereby certify that the following constitutes my proposed decision in the above-entitled matter as a result of the hearing held before me at the above time and place, after due notice thereof having been given accordint to law, and I hereby recommend its adoption as the decision of the Department of Alcoholic Beverage Control.

PROPOSED DECISION

FINDINGS OF FACT:

Received
Aug. 27, 1971

COUNT I

Within one year and immediately preceding the date of the Accusation, respondent-licensee, directly and by and through his agents, employees and servants, did suffer and permit acts, conduct and conditions to exist on said premises which were and are contrary to public welfare and morals within the meaning of Article XX, Section 22, of the Constitution of the State of California and Section 24200(a) of the Business and Professions Code, more particularly described as follows:

1. On or about January 27, 1971, during business hours, a female entertainer, Ann Elizabeth Opland, while dancing on a raised stage located in the above-designated licensed premises, did engage in conduct which included, but is not limited to the following:

a. Said entertainer moved around the stage, while completely nude, exposing her vaginal area and the lips of her vagina. On four occasions she would stop dancing in front of a male patron and lay on her back atop a $3\frac{1}{2}$ X 1' hassock, extend her legs upward in a spread position exposing the inner portion of her vagina, move her body in an upward and downward motion, and in each instance she used a hand on each buttock to spread and separate her vaginal orifice. Upon completion, she would proceed to the aforementioned male patrons' position and bend over at the waist with her back to the patrons and pick up United States currency placed on the stage by the patrons.

2. On or about January 27, 1971, during business hours, a female entertainer, Carolyn Delores Williams, while dancing on a raised stage located in the above-designated licensed premises, did engage in conduct which included, but is not limited to the following:

a. Said entertainer, while completely nude, did push the above described hassock to a position in front of a male patron who had placed a dollar bill wedged in a wrought iron railing, and while seated on the hassock facing the male patron she obtained from said male patron a plastic tipped cigar; she placed the plastic tipped portion of the cigar into her vagina, completely enclosing the plastic tip; using a book of matches which she had carried onto the stage, she lit the open end of the cigar and with the lit cigar extending from her vagina

she made forward and backward pumping motions with her pelvic region.

b. Said entertainer moved the hassock to a position in front of another male patron who had placed a dollar bill on the stage in front of his seat; she then obtained a filter tipped cigarette from the male patron, removed the filter tip from the cigarette, placed the cigarette into her vagina with an end exposed, lit the exposed end with a match and laid back on the hassock; after a short time she removed the cigarette, moved the hassock to two other locations on the stage where she laid on her back with her legs extended upwards using her hands to open her vaginal orifice while facing individual patrons.

3. On or about January 27, 1971, during business hours, a female entertainer, Marvene Jeanette Roks, while dancing on a raised stage located in the above-designated licensed premises, did engage in conduct which included, but is not limited to the following:

a. Said entertainer, while completely nude, did stop dancing in front of male patrons who had money placed on the stage in front of their positions; she then laid on her back atop a hassock, spread her legs wide apart, reached down around her buttocks, placed her hands on each side of her vagina, spread the outer lips apart and made a comment to the male patron, who shook his head; she then turned over on her stomach and made pelvic pumping motions simulating sexual intercourse and exposed her

entire vagina and anal area.

b. Said entertainer walked toward individual male patrons and standing with her legs apart, facing away from the patrons, she would extend her buttocks over the railing; then bending over, reach between her legs and recover money from the stage placed there by the patrons; thereby, exposing her vaginal and anal area.

4. On or about January 27, 1971, during business hours, a female entertainer, Patricia Ann Carrigan, while dancing on a raised stage located in the above-designated licensed premises, did engage in conduct which included, but is not limited to the following:

a. Said entertainer laid on her back, on a hassock, in front of male patrons; with her hands she would spead the lips of her vagina.

b. The allegations of paragraph 4b of the Accusation do not constitute cause for discipline.

5. It is not true that on January 27, 1971, in the licensed prmises, respondent's agent or employee, Guy Wilborn East, wilfully or unlawfully resisted, delayed or obstructed Los Angeles Deputy Sheriffs F. Bridges, J. Welch or J. Holland from conducting an investigation.

FINDINGS AS TO PREVIOUS RECORD:

Licensee's Previous Record:

Licensed as above since October 6, 1969; prior as partner of R. S. Rausa from January 11, 1968. No prior disciplinary action.

DETERMINATION OF ISSUES:

Count I, paragraphs 1, 2, 3, 4a:

Respondent permitted conduct which is per se contrary to public morals. Boreta Enterprises, Inc., A.B.C. 2 Cal(3) 85, 101.

Count I, paragraphs 4b and 5:

No grounds exist to suspend or revoke the license. There was no violation of Penal Code Section 148.

Grounds to suspend or revoke the license exist under the provisions of Article XX, Section 22 of the California Constitution and Section 24200(a) of the Business and Professions Code.

PENALTY OR RECOMMENDATION:

The license is revoked.

Dated at Los Angeles, California, August 25, 1971.

/s/ L. B. Traub

LEON B. TRAUB, Hearing Office
Office of Administrative Procedur

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APPENDIX B

FILED
Apr. 12, 1972
Alcoholic Beverage Control
Appeals Board

BEFORE THE ALCOHOLIC BEVERAGE
CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of the Accusation,	)
	)
against	)
	)
HARRY J. COLEMAN	)
dba Club Hi Dolly	)
12700 S. Western Avenue	)
Los Angeles	)
	)
Respondent & Licensee	)
	)
under the Alcoholic Beverage	)
Control Act.	)
	)

AB-3753
File No. 19842; Reg. No. 125[illegible]
H/O: Traub

Time & Place of Hearing:
March 23, 1972, at 1:30 p.m.
314 West First Street
Los Angeles, California

For Department:
Honorable Evelle J. Younger
Attorney General
Frank A. Iwama
Deputy Attorney General

For Appellant:
Kenneth Scholtz, Esq.

Harry J. Coleman, doing business as Club Hi Dolly, has appealed a decision of the Department of Alcoholic Beverage Control which determined that as to count I, paragraphs 1, 2, 3 and 4a, appellant permitted conduct which was per se contrary to public morals; that as to count I, paragraphs 4b and 5, no grounds existed to suspend or revoke appellant's license, and that there was no violation of Penal Code section 148; that grounds to suspend or revoke appellant's license existed under article XX, section 22 of the California Constitution and section 24200(a) of the Business and Professions Code. As a penalty, appellant's license was ordered revoked.

This appeal is based upon the following grounds:

"(a) The Department has proceeded without, and in excess of, its jurisdiction;

"(b) The decision is not supported by the findings;

"(c) That errors of law were made by the Hearing Officer, as reflected by the transcript of the proceedings;

"(d) The findings are not supported by substantial evidence in the light of the whole record."

The department's decision contains the following:

"FINDINGS OF FACT:

"COUNT I

"Within one year and immediately preceding the date of the Accusation, respondent-licensee, directly and by and through his agents, employees and servants, did suffer and permit acts, conduct and conditions to exist on said premises which were and are contrary to public welfare and morals within the meaning of Article XX, Section 22, of the Constitution of the State of California and Section 24200(a) of the Business and Professions Code, more particularly described as follows:

"1. On or about January 27, 1971, during business hours, a female entertainer, Ann Elizabeth Opland, while dancing on a raised stage located in the above-designated licensed premises, did engage in conduct which included, but is not limited to the following:

"a. Said entertainer moved around the stage, while completely nude, exposing her

vaginal area and the lips of her vagina. On four occasions she would stop dancing in front of a male patron and lay on her back atop a 3½' X 1' hassock, extend her legs upward in a spread position exposing the inner portion of her vagina, move her body in an upward and downward motion, and in each instance she used a hand on each buttock to spread and separate her vaginal orifice. Upon completion, she would proceed to the aforementioned male patrons' position and bend over at the waist with her back to the patrons and pick up United States currency placed on the stage by the patrons.

"2. On or about January 27, 1971, during business hours, a female entertainer, Carolyn Delores Williams, while dancing on a raised stage located in the above-designated licensed premises, did engage in conduct which included, but is not limited to the following:

"a. Said entertainer, while completely nude, did push the above described hassock to a position in front of a male patron who had placed a dollar bill wedged in a wrought iron railing, and while seated on the hassock facing the male patron she obtained from said male patron a plastic tipped cigar; she placed the plastic tipped portion of the cigar into her vagina, completely enclosing the plastic tip; using a book of matches which she had carried onto the stage, she lit the open end of the cigar and with the lit cigar extending from her vagina she made forward and backward pumping motions with her pelvic region.

"b. Said entertainer moved the hassock to a position in front of another male patron who had placed a dollar bill on the stage in front of his seat; she then obtained a filter tipped cigarette from the male patron, removed the filter tip from the cigarette, placed the cigarette into her vagina with an end exposed, lit the exposed end with a match and laid back on the hassock; after a short time she removed the cigarette, moved the hassock to two other locations on the stage where she laid on her back with her legs extended upwards using her hands to open her vaginal orifice while facing individual patrons.

"3. On or about January 27, 1971, during business hours, a female entertainer, Marvene Jeanette Roks, while dancing on a raised stage located in the above-designated licensed premises did engage in conduct which included, but is not limited to the following:

"a. Said entertainer, while completely nude, did stop dancing in front of male patrons who had money placed on the stage in front of their positions; she then laid on her back atop a hassock, spread her legs wide apart, reached down around her buttocks, placed her hands on each side of her vagina, spread the outer lips apart and made a comment to the male patron, who shook his head; she then turned over on her stomach and made pelvic pumping motions simulating sexual intercourse and exposed her entire vagina and anal area.

"b. Said entertainer walked toward individual male patrons and standing with her legs apart, facing away from the patrons, she would extend her buttocks over the railing; then bending over, reach between her legs and recover money from the stage placed there by the patrons; thereby, exposing her vaginal and anal area.

"4. On or about January 27, 1971, during business hours, a female entertainer, Patricia Ann Carrigan, while dancing on a raised stage located in the above-designated licensed premises, did engage in conduct which included, but is not limited to the following:

"a. Said entertainer laid on her back, on a hassock, in front of male patrons; with her hands she would spread the lips of her vagina.

"b. The allegations fo paragraph 4b of the Accusation do not constitute cause for discipline.

"5. It is not true that on January 27, 1971, in the licensed premises, respondent's agent or employee, Guy Wilborn East, wilfully or unlawfully resisted, delayed or obstructed Los Angeles Deputy Sheriffs F. Bridges, J. Welch or J. Holland from conducting an investigation.

"DETERMINATION OF ISSUES:

"Count I, paragraphs 1, 2, 3, 4a:

"Respondent permitted conduct which is per se contrary to public morals. Boreta Enterprises, Inc., A.B.C. 2 Cal(3) 85, 101.

"Count I, paragraphs 4b and 5:

"No grounds exist to suspend or revoke the license. There was no violation of Penal Code Section 148.

"Grounds to suspend or revoke the license exist under the provisions of Article XX, Section 22 of the California Constitution and Section 24200(a) of the Business and Professions Code."

No witnesses were presented by appellant at the department hearing and he does not contradict the findings of the decision. Based upon testimony presented on behalf of the department, we find sufficient evidence in the record to support said findings. (R.T. 17-23.)

Appellant argues that (1) the provisions of article XX, section 22 of the California Constitution and section 24200(a) of the Business and Professions Code, which permit the department to revoke or suspend a license for conduct contrary to public welfare or morals, are unconstitutionally broad when applied to speech and expression protected by the First Amendment; that the described conduct was

entertainment, which is protected by the First Amendment unless found to be obscene; (2) the department's decision is not supported by substantial evidence in light of the whole record nor by findings, in that neither of the findings nor the evidence contained facts which tend to show that the acts complained of were contrary to public welfare or morals; (3) the Alcoholic Beverage Control Act is unconstitutional insofar as it permits the department to make a determination that a performance is obscene or contrary to public welfare or morals in an administrative hearing, without requiring a judicial determination of said issues, citing Blount v. Rizzi, 400 U.S. 410, 91 S.Ct. 423.

The department contends that:

1. The power of the department to regulate conduct which is contrary to public welfare or morals, is constitutional and does not suffer from overbreadth.

2. Nude dancing accompanied by acts which are per se contrary to public welfare or morals are properly, the subject of disciplinary action by the department even in the absence of proof of obscenity.

3. The department's decision is supported by substantial evidence which shows that the acts complained of were contrary to public welfare or morals.

4. The Alcoholic Beverage Control Act is constitutional and is not affected by the decision in Blount v. Rizzi, supra.

The basic issue before us in this administrative proceeding is whether the described conduct was contrary to public morals. The authority of the department to take disciplinary action where conduct has been deemed contrary to public welfare or morals has long been recognized by the courts. (Mack v. Dept. of Alcoholic Bev. Control, 53 Cal. 2d 313, 1 Cal. Rptr. 494.) Also, in the case of Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control, 2 Cal. 3d 85, the court recognized the validity of the authority conferred upon the department by stating:

> "We do not mean to intimate that the Department is confined to considering violations of criminal statutes or departmental directives as grounds for suspension or revocation under section 24200, subdivision (a). It is not disputed that while the Department may properly look to and consider a licensee's violation of the Alcoholic Beverage Control Act, the Penal Code, other state and federal statutes, or Department rules as constituting activities contrary to public welfare or morals, it may also act on situations contrary to the public welfare or morals in the sale of serving of alcoholic beverages regardless of legislative expressions of policy on the subject or prior departmental announcements."

(Footnote 22, p. 99.)

This board has repeatedly held, and it is our opinion herein, that the conduct as described in the findings of this case, was appropriately determined by the department, in accordance with its constitutional and statutory authority, as per se contrary to public morals. (Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control, supra, 2 Cal. 3d 85; also see Proff, AB-3589, petition for writ of review, 2 Civil 39853, dened by Court of Appeal, Second Appellate District, February 18, 1972; petition for hearing, denied by California Supreme Court, March 22, 1972.)

We deem the argument made in this appeal to be without merit. It is our opinion that the findings support the department's decision, which is hereby affirmed.

HUGH M. BURNS, CHAIRMAN
ALCOHOLIC BEVERAGE CONTRC
APPEALS BOARD

We Concur:
Eugene V. Lipp
Kay Valory

Sacramento, California
April 10, 1972

COPY PRINTED CLOSE TO EDGE

APPENDIX C

Los Angeles, Cal. May 10, 1972

Title (HARRY J. COLEMAN, / DEPT. OF A.B.C.) No. 40268

THE COURT:
PETITION FOR WRIT OF REVIEW DENIED

Clay Robbins, Clerk

COPY PRINTED CLOSE TO EDGE

APPENDIX D

CLERK'S OFFICE, SUPREME COURT
4250 State Building

San Francisco, California 94102

June 7 1972

Dear Sir: I have this day filed Order _____

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In re: 2 Civ. No. 40268

Coleman

vs.

Department of ABC

Respectfully,

G. E. Bishel

Clerk

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1971
No. _____

HARRY COLEMAN, doing
business as CLUB HI DOLLY,
Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC
BEVARAGE CONTROL OF THE
STATE OF CALIFORNIA and THE
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD OF THE STATE
OF CALIFORNIA,
Respondents.

ERRATA SHEET

Your attention is called to the following errata in Petition for Writ of Certiorari to the Court of Appeal of the State of California:

On page D-19, please add the following words "Hearing Denied" after "Dear Sir: I have this day filed Order."

Respectfully submitted,

McPHERSON BERRIEN E. MOORE,
KENNETH SCHOLTZ

1515 Redondo Beach Boulevard
Gardena, California 90247

Attorneys for Petitioner

E COPY

NOV 13 1972

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 72-195

HARRY COLEMAN, doing business as CLUB HI DOLLY,

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA and THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 72-195

HARRY COLEMAN, doing business as CLUB HI DOLLY,

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA and THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The decision of the California Department of Alcoholic Beverage Control and the opinion of the California Alcoholic Beverage Control Appeals Board affirming the decision are unreported but are set forth respectively in Appendices "A" and "B" of the Petition for Writ of Certiorari. Petitioner's petition for writ of review (certiorari) was denied by the California Court of Appeal for the Second Appellate District on May 10, 1972, without opinion (See Appendix "C" of the Petition for Writ of Certiorari). Petitioner's petition for hearing was denied by the California Supreme Court on June 7, 1972, without opinion (See

Appendix "D" of the Petition for Writ of Certiorari).

Jurisdiction

The jurisdiction of this Court is invoked under Section 1257(3) of Title 28, United States Code.

Questions Presented

Petitioner alleges in substance (See "Questions Presented" of the Petition for Writ of Certiorari):

1. Is the Alcoholic Beverage Control Act of the State of California unconstitutional insofar as it permits the Department of Alcoholic Beverage Control to revoke a license upon a determination that live entertainment is obscene or is contrary to public welfare or morals after an administrative proceeding without requiring the Department to seek a judicial determination on the subject.
2. Is the power of the Department of Alcoholic Beverage Control to suspend or revoke a license for conduct contrary to public welfare or morals unconstitutionally broad when applied to speech and expression protected by the First Amendment.
3. Was the Department's finding that the events described in the decision were contrary to public welfare or morals supported by evidence sufficient to satisfy the requirements of the First and Fifth Amendments.

Statutes Involved

The pertinent texts of Article XX, Section 22 of the California Constitution and Section 24200(a) of the California Business and Professions Code are set forth in the "Statutory Provisions Involved" of the Petition for Writ of Certiorari.

The text of Sections 23090 through 23090.7 of the California Business and Professions Code is set forth in the Appendix attached hereto.

Statement of the Case

This case involves the State of California's regulation and control of the conditions surrounding the retail sale and consumption of alcoholic beverages on state licensed on-sale[1] alcoholic beverages premises in California under the Twenty-first Amendment to the United States Constitution, under Article XX, Section 22 of the California Constitution, under the California Alcoholic Beverage Control Act (Calif. Bus. & Prof. Code, Div. 9), and under the regulations of the California Department of Alcoholic Beverage Control (Title 4, Calif. Admin. Code).

This case deals more specifically with: (1) the California Department of Alcoholic Beverage Control's constitutional and statutory authority to suspend or revoke alcoholic beverages licenses where the con-

[1] "On-sale" licenses in California authorize the sale and serving of alcoholic beverages to the public for consumption on the licensed premises (such as a bar), as contrasted to "off-sale" licenses authorizing sale of alcoholic beverages to the public for consumption off or away from the licensed premises (such as a package liquor store).

tinuance of the license would be contrary to the public welfare or morals (Art. XX, §22, Calif. Const.; §24200(a), Calif. Bus. & Prof. Code); and (2) the California constitutional and statutory provisions providing for appellate review of California Department of Alcoholic Beverage Control ajudicatory decisions and California Alcoholic Beverage Control Appeals Board appellate opinions by way of petitions for writ of review (certiorari) in the California Supreme Court and the California Court of Appeal (§§23090 through 23090.7, Calif. Bus. & Prof. Code).

On April 5, 1971, an accusation was filed with the California Department of Alcoholic Beverage Control against petitioner's on-sale beer license for "Club Hi Dolly", an establishment located at 12700 South Western Avenue, Los Angeles, California. The accusation charged five separate instances of conduct contrary to public welfare and morals constituting grounds for suspension or revocation of said license under Article XX, Section 22 of the California Constitution and Section 24200(a) of the California Business and Professions Code.

A hearing on the accusation was held on July 28, 1971. On October 28, 1971, the Department filed its decision which found that cause for disciplinary action had been established as alleged and which provided for the revocation of petitioner's alcoholic beverage license (Appendix "A" of the Petition for Writ of Certiorari).

On March 23, 1972, petitioner's appeal from the Department's decision was heard before the California Alcoholic Beverage Control Appeals Board. On April 12, 1972, the Appeals Board issued an opinion affirming the Department's order and decision (Appendix "B" of the Petition for Writ of Certiorari).

On May 10, 1972, the California Court of Appeal for the Second Appellate District denied petitioner's petition for writ of review (certiorari) without opinion (Appendix "C" of the Petition for Writ of Certiorari).

On June 7, 1972, the California Supreme Court denied petitioner's petition for hearing without opinion (Appendix "D" of the Petition for Writ of Certiorari).

ARGUMENT

I. The California Alcoholic Beverage Control Act is Constitutional

A. The California Department of Alcoholic Beverage Control is a State Court of Limited Jurisdiction

Petitioner, citing *Blount* v. *Rizzi*, 400 U.S. 410 (1971), makes the contention that the California Alcoholic Beverage Control Act is unconstitutional because the California procedure does not require the Department to seek judicial review of its administrative determinations.

Before it can be determined whether petitioner's contention is meritorious, a brief review of the California procedure is necessary. First, it must be recognized that the California Department of Alcoholic

Beverage Control is not an administrative agency created by the State Legislature. Rather, it is a California state court of limited jurisdiction, possessing adjudicatory powers with respect to Alcoholic Beverage Control matters. (Art. XX, § 22, Calif. Const.) The fact that the Department is a state constitutional tribunal exercising adjudicatory powers is well settled. See *e.g., Martin* v. *Alcoholic Beverage Control Appeals Board,* 52 Cal.2d 238; 340 P.2d 1 (1959); *Covert* v. *State Board of Equalization,* 29 Cal.2d 125; 173 P. 2d 545 (1946); *Kirby* v. *Superior Court,* 275 Cal.App. 2d 975; 80 Cal.Rptr. 381 (1969); *Department of Alcoholic Beverage Control* v. *Superior Court,* 268 Cal. App.2d 67; 73 Cal.Rptr. 780 (1968); *Francisco Enterprises, Inc.* v. *Kirby,* Case No. C-70 2372, ... F.Supp. . . . . (N.D. Cal. 1971); *Kuzinich* v. *Kirby,* Case No. 72-113, ... F.Supp. . . . . (N.D. Cal. 1971).

It is also important to note that a final adjudicatory decision of the Department may be reviewed by an appeal to the constitutionally created California Alcoholic Beverage Control Appeals Board. Thereafter, the aggrieved party may apply for a writ of review (certiorari) to the California Court of Appeal and the California Supreme Court. Thus, the California procedure provides for appellate review of the Department's judicial determinations. This is particularly so in view of the fact that the Department is itself a state court of limited jurisdiction and not a legislatively created state administrative agency.

Furthermore, petitioner's reliance on the *Blount* case is misplaced. *Blount* involved the issue of governmental censorship and the possible curtailment of constitutionally protected speech within the First Amendment. The present case focuses on the licensing powers of a state over the retail sale and consumption of alcoholic beverages on state licensed premises. The Department's action was not based on the issue of obscenity or speech protected by the First Amendment, but rather its licensing power to regulate and control the sale of alcoholic beverages within the State of California. In this respect, both traditionally [2] and under the Twenty-first Amendment,[3] the power of a state to regulate and control alcoholic beverages destined for use, distribution or consumption within its borders—including seizure or complete prohibition as well as any restriction falling short of prohibition even if discriminatory in nature—has been almost unconditional.

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[2] *Mugler* v. *Kansas*, 123 U.S. 623, 657–671 (1887); *Crowley* v. *Christensen*, 137 U.S. 86, 91 (1890); *Giozza* v. *Tiernan*, 148 U.S. 657, 661–662 (1893); *Cronin* v. *Adams*, 192 U.S. 108, 114–115 (1904); *Cox* v. *Texas*, 202 U.S. 446, 451 (1906); *Purity Extract Co.* v. *Lynch*, 226 U.S. 192, 201 (1912); *Seaboard Air Line Ry.* v. *North Carolina*, 245 U.S. 298 (1917); *Crane* v. *Campbell*, 245 U.S. 304, 307 (1917); *McCormick & Co.* v. *Brown*, 286 U.S. 131, 140–141 (1932).

[3] *State Board of Equalization* v. *Young's Market*, 299 U.S. 58, 63–64 (1936); *Mahoney* v. *Triner Corp.*, 304 U.S. 401 (1938); *Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Commission*, 305 U.S. 391, 394 (1939); *Ziffrin* v. *Reeves*, 308 U.S. 132, 138 (1939); *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945).

II. The Authority of the California Department of Alcoholic Beverage Control to Regulate Conduct Which is Contrary to Public Welfare or Morals is Constitutional and is Properly the Subject of Disciplinary Action Even in the Absence of Proof of Obscenity.

A. The Non-Verbal Acts and Conduct Engaged in by Petitioner's Employees Were Not "Dances" or "Speech" and Therefore Were Not Within or Entitled to First Amendment Protection.

While the First Amendment protection has been expanded to encompass certain non-verbal acts and conduct engaged in by persons for the purpose of expressing an idea ("symbolic speech"),[4] this does not mean that any and all non-verbal acts and conduct which allegedly are engaged in with the intent of expressing an idea are automatically "speech" and within the protection of the First Amendment. In *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968), this Court stated:

> "O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected 'symbolic speech' within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of 'communication of ideas by conduct,' and that his conduct is within this defi-

[4] *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969) (march against school segregation); *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969) (wearing black armbands in protest against government policy); *Hughes* v. *Superior Court of California*, 339 U.S. 460 (1950) (picketing); *Stromberg* v. *California*, 283 U.S. 359 (1931) (display of flag); and see *United States* v. *O'Brien*, 368 U.S. 367 (1968) (draft card burning) wherein it was assumed that the purported communicative element of O'Brien's conduct (protest against war and draft) was sufficient to bring the First Amendment into play. 391 U.S. at 376.

nition because he did it in 'demonstration against the war and against the draft."

"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." (Emphasis added.)

Without attempting to speculate as to what, *if any,* idea or protest petitioner's female employees were attempting to express to the patrons by touching and exposing their vaginal areas, by exposing their anuses, by simulating sexual intercourse, by placing cigars and cigarettes into their vaginas, and by moving items of United States currency over their pubic areas, it is submitted that such non-verbal acts and conduct have no intrinsic or clearly recognizable and significant communicative or "symbolic speech" element entitling them to First Amendment protection.

B. The Acts for Which the State May Discipline Licensed Premises Are Not Restricted to Obscene Conduct.

Assuming, arguendo, that the non-verbal acts and conduct engaged in by petitioner's employees are within the First Amendment protection, obscenity is not the only basis upon which a state may regulate or limit First Amendment activity.[5] Petitioner, however,

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[5] *Hughes* v. *Superior Court of California*, 339 U.S. 460 (1950) and *International Brotherhood of Teamsters* v. *Hanke*, 339 U.S. 470 (1950) (picketing); *Beauharnis* v. *Illinois*, 343 U.S. 250 (1952) (libel); *United States* v. *Harris*, 347 U.S. 612 (1954) (lobbying); *Beard* v. *Alexandria*, 341 U.S. 622 (1951) (door-to-door soliciting); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (sound trucks), *United States* v. *O'Brien*, 391 U.S. 367 (1968) (draft card burning); and see *Adderley* v. *Florida*, 385 U.S. 39, 47–48 (1966), and *Purity Extract Co.* v. *Lynch*, 226 U.S. 192, 201 (1912).

cites *La Rue* v. *State of California,* 326 F.Supp. 348 (C.D. Cal. 1971), for the proposition that the Department's rules must conform to the constitutional standards for the regulation of obscenity and that the state could not control entertainment on a standard of public welfare and morals. It is submitted, as was our position on the appeal in *La Rue* before this Court, that the District Court's opinion in that case is clearly erroneous when considered in light of the existing law. (*California* v. *La Rue,* Case No. 71-36 (October Term, 1971).)

Furthermore, petitioner's reliance on the obscenity standard expressed in *Roth* v. *United States,* 354 U.S. 476 (1957), and *In re Giannini,* 69 Cal.2d 563; 446 P.2d 535 (1968), and their progeny is similarly misplaced in that those cases involved criminal prosecutions for violations of criminal obscenity statutes. The present case, on the other hand, is not based on violations of any criminal statute, does not constitute a criminal proceeding, and does not involve obscenity. *Yakov* v. *Board of Medical Examiners,* 68 Cal.2d 67; 435 P.2d 553 (1968). Rather, the present case is civil in nature and does not entail criminal punishment, but instead involves disciplinary action against alcoholic beverage license privileges.

The California Supreme Court in *Boreta Enterprises, Inc.* v. *Department of Alcoholic Beverage Control,* 2 Cal.3d 85; 465 P.2d 1 (1970), has assured that the power of the Department to regulate conduct contrary to public morality will not be applied in a sweep-

ing and improper manner by requiring the question of public morality to be proved as any other fact at trial, unless the conduct involved is *per se* contrary to public morality. The court announced that the Department may revoke a license "for good cause" and that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determing what is contrary to public welfare or morals. Further, the court expressly stated that certain conduct could be contrary to public morals *per se*:

> "There may be cases in which the conduct at issue is so extreme that the Department could conclude that it is per se contrary to *public* morals. By this we mean that it is so vile and its impact upon society is so corruptive, that it can be almost immediately repudiated as being contrary to the standards of morality generally accepted by the community after a proper balance is struck between personal freedom and social restraint." (*Boreta Enterprises, Inc.* v. *Department of Alcoholic Beverage Control, supra,* 2 Cal.3d at 101; 465 P.2d at 12.)

It is submitted that the conduct and acts which were found to have been committed by petitioner's employees on the licensed premises were of such a vulgar and vile nature as to constitute prohibited conduct within the purview of the disciplinary powers of the Department.

III. The Decision of the California Department of Alcoholic Beverage Control is Supported by Substantial Evidence.

A review of the facts in the present case reveals that the Department's decision is supported by substantial evidence. The decision makes findings of fact in detail as to the numerous improper acts which were engaged in by petitioner's employees on the licensed alcoholic beverage premises. Among the conduct which occurred included nude performances by female employees displaying and touching their genitalia, exposing their anuses, simulating sexual intercourse, placing cigars and cigarettes in their vaginal orfices, and moving items of United States currency over their pubic areas.

It is submitted that the Department's decision, which found and determined that petitioner permitted his employees to engage in acts contrary to the public welfare and morals on state licensed on-sale alcoholic beverage premises, was fully supported by the evidence in the case.

Conclusion

For the foregoing reasons, it is respectfully requested that the petition for writ of certiorari be denied.

Dated: November 13, 1972.

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APPENDIX

Sections 23090 through 23090.7 of the California Business and Professions Code provides:

"23090. Any person affected by a final order of the board, including the department, may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose, for a writ of review of such final order. The application for writ of review shall be made within 30 days after filing of the final order of the board.

"23090.1. The writ of review shall be made returnable at a time and place then or thereafter specified by court order and shall direct the board to certify the whole record of the department in the case to the court within the time specified. No new or additional evidence shall be introduced in such court, but the cause shall be heard on the whole record of the department as certified to by the board.

"23090.2. The review by the court shall not extend further than to determine, based on the whole record of the department as certified by the board, whether:

"(a) The department has proceeded without or in excess of its jurisdiction.

"(b) The department has proceeded in the manner required by law.

"(c) The decision of the department is supported by the findings.

"(d) The findings in the department's decision are supported by substantial evidence in the light of the whole record.

"(e) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

"Nothing in this article shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence.

"§23090.3. The findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department. The board, the department, and each party to the action or proceeding before the board shall have the right to appear in the review proceeding. Following the hearing, the court shall enter judgment either affirming or reversing the decision of the department, or the court may remand the case for further proceedings before or reconsideration by the department.

"23090.4. The provisions of the Code of Civil Procedure relating to writs of review shall, insofar as applicable, apply to proceedings in the courts as provided by this article. A copy of every pleading filed pursuant to this article shall be served on the board, the department, and on each party who entered an appearance before the board.

"23090.5. No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm, reverse, correct, or annul any order, rule, or decision of the department or to suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the department in the performance of it duties, but a writ of

mandate shall lie from the Supreme Court or the courts of appeal in any proper case.

"23090.6. The filing of a petition for, or the pendency of, a writ of review shall not of itself stay or suspend the operation of any order, rule, or decision of the department, but the court before which the petition is filed may stay or suspend, in whole or in part, the operation of the order, rule, or decision of the department subject to review, upon the terms and conditions which it by order directs.

"23090.7. No decision of the department which has been appealed to the board and no final order of the board shall become effective during the period in which application may be made for a writ of review, as provided by Section 23090."

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